Nos. 94-7448, 94-7492

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

ROLAND J. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

CANDISHA S. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the 5-4 decision of the court below misinterpreted 18 U.S.C. § 924(c)(1) – which imposes a mandatory 5-year consecutive sentence on a person who "uses or carries" a firearm "during and in relation to" a drug-trafficking offense – by adopting a standard that looks solely to the "proximity and accessibility" of the firearm to the drugs, drug paraphernalia, or drug proceeds, rather than to active employment of the firearm or to other relevant factors such as the type of weapon involved, whether it was loaded and ready to fire, and the presence of expert testimony to support the government's theory of "use."

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the en banc court of appeals (J.A. 78-119) is reported at 36 F.3d 106. The order granting rehearing en banc in *Bailey* (J.A. 33) is reported at 4 F.3d 1004. The panel opinion in *Bailey* (J.A. 17-32) is reported at 995 F.2d 1113. The panel opinion (J.A. 47-76) and the order granting rehearing en banc (J.A. 77) in *Robinson* are reported together at 997 F.2d 884. The opinion of the district court denying a motion for judgment of acquittal in *Robinson* (J.A. 38-46) is reported at 779 F. Supp. 606.

JURISDICTION

The court of appeals entered its judgment on October 4, 1994. J.A. 78. The petition for a writ of certiorari in *Bailey* was filed on December 28, 1994. The petition for a writ of certiorari in *Robinson* was filed on December 29, 1994. On April 17, 1995, this Court granted both petitions along with petitioners' motions to proceed *in forma pauperis*, and consolidated the cases. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Pertinent provisions of 18 U.S.C. § 924 are reproduced in an appendix to this brief.

STATEMENT

In separate trials growing out of unrelated incidents, petitioners Roland J. Bailey and Candisha S. Robinson were each convicted of, among other things, using or carrying a firearm "during and in relation to" the crime of possession of cocaine with intent to distribute it, in violation of 18 U.S.C. § 924(c)(1). Separate panels of the D.C. Circuit affirmed Bailey's conviction and reversed Robinson's. The court granted rehearing en banc in both cases and, in a closely divided decision, affirmed both convictions.

1. *Bailey's Arrest, Trial, and Panel Appeal*. a. We describe the evidence in the light most favorable to the government. On the morning of May 2, 1988, two police officers patrolling in Washington, D.C., stopped petitioner Bailey when they noticed that the car he was driving had no front license plate and no inspection sticker. J.A. 18. Officer Washington asked Bailey for his driver's license. When Bailey handed him a District of Columbia identifi-

cation card instead, Washington ordered Bailey to get out of the car. J.A. 10. As Bailey stepped out of the car, Officer Washington saw him push something between the front seat and the console separating the two front seats. J.A. 3, 18, 80. Washington then searched the passenger compartment of the car and discovered one round of .380-caliber ammunition on the console and a satchel containing 30 grams of cocaine in 27 plastic bags. J.A. 18, 80; 2/27/90 Tr. 74-75, 93, 106, 125.

After arresting Bailey, the officers unlocked the car trunk (which was inaccessible from the passenger compartment) and found a vest containing $2500 in cash. 2/27/90 Tr. 97-98, 117.[1] The police also found, beneath "a whole lot of items" including "clothing and bags and other things," a bag containing a 9-mm. handgun that was "loaded with one clip" of ammunition containing six .380-caliber bullets. J.A. 6, 9; 2/27/90 Tr. 106. The police could not see the gun when they opened the trunk; indeed, the trunk was so full that it took roughly one minute to find the bag containing the gun. J.A. 9. Both officers testified that they did not see Bailey do anything other than drive the car. J.A. 5, 8.

The government indicted Bailey for (1) possession of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841(a); (2) using or carrying a firearm during and in relation to that drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and (3) illegal possession of a firearm, in violation of 18 U.S.C. § 922(g). J.A. 17; 2/27/90 Tr. 5; C.A. App. Tab C. At trial, the government presented evidence that Bailey had recently purchased the car he was driving. 2/28/90 Tr. 7-11. The evidence also showed that the pistol recovered from the trunk of the car, though loaded with a clip of ammunition, was not ready to fire because a bullet had not yet been chambered. 2/27/90 Tr. 106, 132-136. In addition, the government's weapons expert testified that, because the clip in the gun contained .380 ammunition instead of the larger 9-mm. ammunition it was designed to hold, the weapon could be fired only once; "you cannot fire another round unless you manually remove empty rounds" and then "feed another round into the chamber." *Id.* at 139-140.

[1] The court below twice misstated the record in declaring that the trunk contained $3216. J.A. 18, 80. In fact, the record establishes that the police found a *total* of $3216, only about $2500 of which was in the trunk; the remaining $700 was on Bailey's person. 2/27/90 Tr. 97.

Another government expert, Detective DiDomenico, testified that the quantity of cocaine in Bailey's car indicated that it was intended for street sale, and that drug dealers frequently have a firearm "on their person or within reach" (J.A. 11) to protect themselves and "their assets, drugs and money" (J.A. 10, 81). DiDomenico testified further that the purpose of having a firearm within reach was for protection against "stickup boys" who try to steal the drugs or money. J.A. 11-13. He agreed that, "[i]f you are trying to protect yourself" in this way, the weapon's "power and speed" are "what's most important." J.A. 13. DiDomenico also emphasized that a drug seller would need immediate access to his firearm because he would get no notice before a "stickup boy" confronted him:

> Q. (by defense counsel): In all your experience talking with the stickup boys, did any of them ever tell you that they ever gave the person they were sticking up an opportunity to go get their gun first?
>
> A. (DiDomenico): That's ridiculous, no.

J.A. 13. The jury found Bailey guilty on all counts, and he was sentenced to concurrent 51-month terms on the counts not at issue here, a consecutive 60-month term on the Section 924(c)(1) conviction, and three years of supervised release. J.A. 19; 6/8/90 Tr. 35. The district court denied mid-trial and post-trial motions for a judgment of acquittal. 2/28/90 Tr. 13-18; 3/1/90 Tr. 7.

b. A panel of the court of appeals affirmed. J.A. 17-32. The court rejected Bailey's claim that there was insufficient evidence from which the jury could find beyond a reasonable doubt that he "used" the gun locked in the trunk of the car "during and in relation to" the underlying drug-trafficking offense of possession of cocaine with intent to distribute it. The majority stated that the government "need not establish that the defendant brandished or discharged the weapon"; it is enough to demonstrate "that the firearm was available to provide protection to the defendant." J.A. 21, 22 (internal quotations omitted). Acknowledging that "the gun here was not within Bailey's reach while he was driving," the court nonetheless concluded that the jury "could reasonably infer

* * * that the weapon located in the trunk was used to facilitate the defendant's [past] sales of narcotics and the possession of all of the drugs that necessarily preceded those transactions." J.A. 24-25.

The majority rejected Bailey's argument that his conviction should be reversed on the strength of *United States* v. *Derr*, 990 F.2d 1330 (D.C. Cir. 1993), and *United States* v. *Bruce*, 939 F.2d 1053 (D.C. Cir. 1991). J.A. 26-27. In both those cases, guns were found in close proximity to drugs, but the court held that the evidence, though possibly sufficient to show that the defendant intended to use the gun in some future act of distribution, was insufficient to demonstrate use during and in relation to the predicate offense of possession with intent to distribute. The majority distinguished these cases on the ground that they involved *future distributions*, whereas in Bailey's case the jury could reasonably have concluded (despite the absence of either a charge or evidence of actual past drug transactions) that he used the gun to protect "an earlier distribution" and the "earlier possession" that necessarily accompanied it. J.A. 26-27.

Judge D.H. Ginsburg dissented from the majority's resolution of the "use or carry" issue, opining that its holding could not "honestly be reconciled" with *Derr* and *Bruce*. J.A. 29. "I for one cannot imagine," he stated, "how a gun in a locked car trunk could have been used to protect the possession of the 27 bags in the front seat – if one accepts the premise that the guns in *Derr* and *Bruce* could not protect the drugs with which they were closeted." J.A. 31. Judge Ginsburg also made it clear, however, that he believed the rule of *Derr* and *Bruce* to be unsound. J.A. 29, 32.

2. *Robinson's Arrest, Trial, and Panel Appeal.* a. On July 15, 1991, undercover officer Larry Hale approached Veloria Robinson, petitioner's sister, in the northeast quadrant of Washington and indicated that he wished to buy crack cocaine. J.A. 48; 10/30/91 Tr. 4-5. Veloria Robinson took him to an apartment and knocked on the door. J.A. 48, 81. Hale testified that petitioner answered the door, and Veloria Robinson told her that Hale wanted something. J.A. 48, 81. Petitioner asked him what he wanted, and Hale replied, a "twenty." J.A. 48, 81; 10/30/91 Tr. 7. Hale testified that he then entered the apartment, where he observed petitioner, in the apartment's only bedroom, hand her sister a rock

of crack cocaine. J.A. 48, 81. Veloria Robinson emerged from the bedroom and gave the cocaine rock to Hale in exchange for $20 in marked money. J.A. 48, 81.

On the next evening, July 16, Hale was climbing the stairs leading to the apartment when he was approached by a man named Kwarme Parker, who said that Veloria Robinson was inside the apartment, but that he also lived in the apartment and could serve him. J.A. 48, 81. While Hale waited in the hallway outside the front door, Parker entered the apartment, reemerged, and gave Hale cocaine in exchange for $20 in marked money. J.A. 48-49.

Approximately thirty minutes later, a warrant-authorized search of the apartment led to the discovery in the bedroom closet of a locked footlocker, which contained an operable but unloaded .22-caliber Derringer in a holster, two rocks of crack cocaine weighing a total of 10.88 grams, $20 in marked money from the sale by Parker, $42.80 in other cash, and papers bearing petitioner's name. J.A. 49, 55, 81, 106; 10/30/91 Tr. 28, 36-39, 43-44, 52-57, 59, 69. The police also recovered from the apartment a cassette tape package that contained empty ziplock bags. J.A. 49, 63, 81. There was no ammunition in the apartment. J.A. 55.

Petitioner Robinson was indicted on six counts, including possession of five or more grams of cocaine base on July 16, 1991, with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B)(iii), and 18 U.S.C. § 2 (Count III); possession of five or more grams of cocaine base within 1000 feet of a public school on July 16, 1991, with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2 (Count IV); and using or carrying a firearm on July 16, 1991, in the course of the offense charged in Counts III and IV and in violation of 18 U.S.C. § 924(c)(1), 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2 (Count V). J.A. 38 n.1.[2] Consistent with the indictment, the jury instruction relating

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[2] The remaining counts were distributing crack cocaine on July 15, 1991, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. § 2 (Count I); distributing crack cocaine within 1000 feet of a public school on July 15, 1991, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2 (Count II); and knowingly

to the Section 924(c)(1) count required a finding that a firearm was used or carried during the *July 16* predicate offenses (Counts III and IV). J.A. 35-36.

A government expert testified that the .22-caliber Derringer was a "second gun" – the type of weapon a drug dealer would "keep hidden on [her] person and use it until [she] get[s] [her] real gun." 10/30/91 Tr. 79; J.A. 49. He also testified that drug dealers generally use guns to protect themselves from robbers, rival dealers, employees, and the police. J.A. 49; 10/30/91 Tr. 77-78.

Petitioner testified that she rented the apartment and received rent contributions from her sister, Kwarme Parker, and Sharine McKinney. J.A. 50; 10/30/91 Tr. 135-136; 10/31/91 Tr. 147-149, 153. She testified that the footlocker belonged to her but that she had no knowledge of the gun or drugs found in it. J.A. 50; 10/30/91 Tr. 133, 136; 10/31/91 Tr. 152-153. She explained that she had taken in Parker, who was dating her sister Veloria, even though she knew he was selling drugs (but not out of her apartment), because he had no place to go and because she needed help with the rent. Petitioner's testimony, corroborated in part by other witnesses (J.A. 50; 10/30/91 Tr. 104, 113-120), was that she took active steps to prevent Parker from bringing drugs into her apartment. J.A. 50; 10/30/91 Tr. 131-133, 135; 10/31/91 Tr. 151-152. Petitioner also testified that she had allowed Parker to place a padlock on the footlocker because he complained that someone was stealing money from him, that Parker had the keys to the footlocker, and that she checked the footlocker frequently to be sure it contained no drugs. 10/30/91 Tr. 133-136; 10/31/91 Tr. 149-152; see also 10/30/91 Tr. 110 (testimony of Sharine McKinney) (Parker "was the only one with the key, period"). Petitioner also offered an alibi for July 15 and read from the transcript of her sister's plea hearing, where Veloria Robinson stated that it was her girlfriend rather than petitioner who helped to sell the crack to

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making available for use a building, room, or enclosure for the purpose of using, storing, manufacturing, or distributing cocaine base on or about July 16, 1991, in violation of 21 U.S.C. § 856(a) and 18 U.S.C. § 2. J.A. 38 n.1.

Officer Hale on July 15. J.A. 50-51; 10/30/91 Tr. 129-131; 10/31/91 Tr. 144-145, 157-159.

Petitioner was convicted on all six counts. The district court denied her mid- and post-trial motions for a judgment of acquittal. 2/28/90 Tr. 174; J.A. 38-46. She was sentenced to 157 months of imprisonment, a four-year term of supervised release, and a special assessment of $300. J.A. 82.

b. A panel of the D.C. Circuit reversed Robinson's Section 924(c) conviction. J.A. 47-76. The court first observed that Section 924(c), by its terms, "conspicuously fails to criminalize mere possession of a firearm during and in relation to a drug trafficking offense." J.A. 53. Under the statute's language, moreover, "even if an individual *intends to use* a firearm in connection with a drug trafficking offense, the conduct of that individual is not reached by the statute unless the individual *actually uses* the firearm for that purpose." J.A. 53. (emphasis added). Applying the multi-factor test then used by the D.C. Circuit to determine "use," the court reversed Robinson's conviction because "there is absolutely no evidence that Ms. Robinson has ever brandished or previously used the firearm in the locked trunk"; the gun "certainly was not easily accessible since it was in the bedroom closet in a locked footlocker"; the gun was a "small derringer," was the only gun on the premises, and was "unloaded * * * without ammunition anywhere on the premises"; and "[e]ven the government's drug expert, Officer Stroud, confessed to the jury that the derringer recovered from the locked footlocker was not the type of gun a drug dealer ordinarily would use to protect a stash of drugs." J.A. 54-55.

The court also rejected the government's argument that the gun was used by petitioner "to protect her stash of drugs in the locked trunk," explaining that it was difficult to see how the gun could be "of any help to Ms. Robinson in the event of an emergency": "In order to brandish the gun, Ms. Robinson would have to run to the closet, unlock the trunk, open the trunk and grab the gun," and even then "the gun would be of virtually no use to Ms. Robinson since it was unloaded and there was no ammunition for it anywhere in the apartment." J.A. 54-55. And the court rejected the government's alternative argument that the jury could reasonably have inferred actual use of the firearm because

petitioner's apartment was a "crack house." J.A. 56-57. Judge Henderson dissented. J.A. 61-76.

3. *The En Banc Court's Opinion*. On rehearing en banc, a divided court upheld both convictions. J.A. 78-119. The bare majority of five judges abandoned the "complex, open-ended test" previously employed to determine whether a firearm was "used" and replaced it "with a test that looks to two factors only": the proximity of the gun "to the drugs, drug paraphernalia, or drug proceeds" involved in the underlying offense; and "the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located." J.A. 80, 101.

The majority acknowledged that, in both of petitioners' cases, the predicate offense for the § 924(c)(1) count was possession of cocaine with intent to distribute it. J.A. 80. The court criticized its own prior approach and concluded that other circuits "focus[ ], in essence, upon whether the firearm was accessible and proximate to the defendant during the commission of the drug offense." J.A. 83-92. As to Section 924(c)(1)'s requirements that a firearm be "used" and that such use occur "during" as well as "in relation to" the predicate offense, the court first acknowledged that the statute does not criminalize "the mere possession of a firearm by someone who commits a drug offense." J.A. 82, 93-100. "[U]se," the court noted, "could be defined either narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, or more broadly, so as to include the other ways in which a gun can be used to facilitate drug trafficking." J.A. 93.

The court acknowledged that the former approach has "the virtue of simplicity" and would make it "relatively easy to determine" liability. Without even acknowledging the rule of lenity, however, the court rejected the "paradigmatic" approach because "nothing in the statute indicates that the Congress intended" it and because "use" is an "expansive[ ]" term that does not require active employment of a gun. J.A. 93 (citing *Smith* v. *United States*, 113 S. Ct. 2050, 2054, 2058 (1993)). Accordingly, the court concluded that one "uses" a gun within the meaning of Section 924(c)(1) by either placing or keeping the gun in a location "from which one (or one's agent) can gain access to it *if and when needed to facilitate a drug crime*." J.A. 95 (emphasis added). The

court held further that, when the predicate drug offense is a "continuing offense" such as possession with intent to distribute, the government need not show that the gun was in such a place at the time the defendant is arrested; it is enough to show that the defendant "put or kept the gun" in such a place "at some point" in time during the defendant's possession of drugs. J.A. 95.

The majority also held that a firearm is used "during and in relation to" a predicate drug offense if it is "positioned so as to be available for use during ongoing drug activity." J.A. 96. The court stressed that the gun did not have to "further[ ]" the drug offense, provided that its location suggests that it had the *potential* to facilitate the drug offense. J.A. 95.[3] The majority opinion made no attempt to define the "carry" component of Section 924(c)(1) or to delimit the scope of "use" *vis-à-vis* "carry."

Applying those standards, the court concluded that the government had submitted sufficient evidence to convict both Bailey and Robinson. J.A. 100-101. The court held that the gun in the locked trunk of Bailey's car was "used" because it was "found in the same place as the cash (namely, the trunk) and in the same car as the drugs" and was "easily accessible to Bailey at any time that he was handling either the drugs or the proceeds of the sale." J.A. 100. As for Robinson, the court similarly concluded that the Derringer found in the locked trunk in her apartment was "proximate to the drugs, and it was accessible to anyone, such as Robinson, who had access to the drugs." J.A. 101.

Judge Wald dissented in part. J.A. 102-106. She stated that the majority's twofold standard for determining whether a firearm

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[3] In reaching this conclusion, the court cited several cases broadly interpreting the phrase "relates to" in 29 U.S.C. § 1144(a), the preemption clause of the Employment Retirement Income Security Act (ERISA), and concluded that Congress's choice of the phrase "in relation to" was "clearly deliberate and an indication that it intended § 924(c)(1) to be a broad prohibition, reaching more than conduct that actively advances the underlying predicate drug offense." J.A. 97. In addition, the court relied on Congress's failure in 1985 to enact a bill that would have replaced – in the "carrying" but not the "use" prong of Section 924(c)(1) – the "in relation to" requirement with a more restrictive "in furtherance of" requirement. J.A. 97-98.

was "used" "artificially limit[s]" the factors necessary to distinguish "use" from mere possession. J.A. 103; see also J.A. 102 ("Congress * * * created no statutory presumption that 'use' automatically would follow from the presence of any particular factors, and I can find no authority for courts to do so."). Judge Wald identified several additional factors, such as the type of gun involved, whether the gun was loaded, and whether expert testimony supported an inference of "use," that in her view are crucial to distinguishing "use" from mere possession. J.A. 102. She also criticized the majority's test as unclear and the two factors as collapsing into one. J.A. 103 ("It seems that whenever the guns are located proximately to the drugs, they must also be potentially accessible to the defendant *from the place the drugs are stored*."). Despite her staunch disagreement with the legal standard adopted by the majority, Judge Wald – alone among the nine participating judges of the court of appeals – concluded that, through the application of a traditional balancing of the appropriate factors, Bailey's conviction should be affirmed and Robinson's reversed. J.A. 106.

Judge Williams, joined by Judges Silberman and Buckley, dissented outright. J.A. 107-119. Judge Williams faulted the majority's reliance on inferences of *potential* use, arguing that, under the plain meaning of the statutory term, "use" "normally implies activity." J.A. 108 (citing *United States* v. *McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)). The three-judge dissent rejected the majority's reliance on *Smith* v. *United States* to extend "use" to encompass potential use (J.A. 115-116):

> Nothing in *Smith* precludes limiting "use" to active employment. [*Smith*'s] statement that "§ 924(c)(1)'s language sweeps broadly", * * * 113 S.Ct. at 2054, means only that the proscribed use of firearms is not limited to the obvious or typical ways in which they may assist in the commission of a crime. Rather, a gun may be "used" regardless of whether it acts as an instrument to shoot, to bludgeon, or for exchange. That is, whether a firearm is "used" does not depend on whether it is employed in the customary way or a more creative way. But it does depend on whether the gun is employed at all, and nothing [in *Smith*] expands "use" beyond active employment.

Judge Williams also noted that Section 924 itself distinguishes the actual use of a firearm, on the one hand, from intent or potential for use, on the other. J.A. 112 (citing 18 U.S.C. § 924(d)). Quoting this Court's observation in *Smith*, 113 S. Ct. at 2057, that "using a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)," Judge Williams concluded that the majority opinion was inconsistent with Congress's choice not to reach mere "intent to use" in subsection (c). J.A. 112.

Judge Williams also examined the origins of Section 924(c)(1) and the legislative materials accompanying Congress's revisions of the statute in 1984 and 1986, which he concluded confirm that "use" was intended to reach only active employment of a firearm. J.A. 109-112. And Judge Williams criticized the majority's definition of "use" as being so broad that it "leave[s] no apparent role" for the alternate element of "carrying" a firearm during and in relation to a predicate offense. J.A. 112. Judge Silberman joined Judge Williams's dissent and also dissented separately. J.A. 119.

SUMMARY OF ARGUMENT

Section 924(c)(1) imposes mandatory, consecutive sentences (of at least five years and of up to life imprisonment) on any person who "uses or carries" a firearm "during and in relation to" a crime of violence or a drug-trafficking offense. In these cases, the Court is called on to decide what category of conduct Congress singled out for this especially severe sanction and, conversely, what conduct with respect to firearms Congress intended to treat differently by punishing through the process of sentencing for the underlying drug-trafficking offense.

I. "Use" under Section 924(c) means the active employment of a firearm to carry out the predicate offense. Such active (as opposed to passive or potential) employment includes firing, discharging, aiming, pointing, bludgeoning, trading, threatening with or brandishing, or displaying. It may also include referring to the gun if such action assists in the accomplishment of the predicate offense. "Use" normally requires that the defendant handle the firearm or be aware of use of the weapon by others involved in the predicate offense. This definition, we submit, is consistent with the ordinary meaning of the word "use" as suggesting some kind of *activity*, see *United States* v. *McFadden*,

13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting), and is rooted in the text, structure, and legislative history of the statute. At a minimum, this reading is dictated by the rule of lenity, because no other plausible interpretation is "unambiguously correct." *United States* v. *Granderson*, 114 S. Ct. 1259, 1267 (1994).

II. If the Court rejects this definition, it would then be required to draw a line somewhere else along the continuum between actual employment of the firearm to carry out the predicate offense and mere possession, which even the majority below acknowledged the statute does not reach. The Court should reject the D.C. Circuit's "proximity and accessibility" standard because it in fact criminalizes instances of mere possession; contravenes other limits on "use" liability apparent from the text, structure, and legislative history of the statute; and unduly limits the ability of juries and courts to consider all relevant factors in deciding whether a firearm was "used" as opposed to merely possessed. The Court should take this occasion to articulate several clear limits on "use" liability and should endorse an approach to determining "use" within those limits that at least takes into account all pertinent factors.

ARGUMENT

Two years ago, in *Smith* v. *United States*, 113 S. Ct. 2050, 2058 (1993), the Court held that a defendant who attempted to obtain a large quantity of cocaine from a pawnshop owner by displaying and offering to trade a machine gun for the drugs was properly convicted of "using" that firearm "during and in relation to" the predicate offenses of attempt (and conspiracy) to possess cocaine with intent to distribute it. The Court rejected the narrower interpretation that the statute requires "use as a weapon" and determined that a firearm is "used" if a defendant "employ[s]" or "derive[s] service from" the firearm. Although the Court noted that the definition of "use" is "expansive[ ]" (*id.* at 2058), it nevertheless cautioned that the term is "not without limits." *Id.* at 2054 (citing *United States* v. *Long*, 905 F.2d 1572, 1576-1577 (D.C. Cir.) (Thomas, J.), cert. denied, 498 U.S. 948 (1990)). The present cases afford the Court an opportunity to give meaning to the limits that circumscribe Section 924(c)(1)'s scope and halt the lower courts' continuing efforts to rewrite the statute by

allowing juries to equate "use" with mere "possession" of a firearm – and constructive rather than actual possession, at that.

I. A DEFENDANT "USES" A FIREARM "DURING AND IN RELATION TO" A DRUG-TRAFFICKING OFFENSE BY ACTIVELY EMPLOYING THE WEAPON TO CARRY OUT THE PREDICATE OFFENSE

The ordinary meaning of Section 924(c)(1)'s operative language and the language and structure of Section 924 as a whole show that Congress intended to impose mandatory sentences only on those who actively employ a firearm to carry out the predicate offense. Such active employment includes firing or discharging, aiming, pointing, bludgeoning, trading, threatening with, brandishing, or displaying. It can also include referring to the weapon. To the extent there is any ambiguity about the meaning of the statute, it is completely dispelled by the legislative history of Section 924(c)(1). Because there is no evidence that Bailey or Robinson ever "used" a firearm within the meaning of Section 924(c)(1), their convictions should be reversed. Even if other constructions of the term "use" are possible, the rule of lenity calls for this reading.

A. The Language And Structure Of Section 924(c)(1) Clearly Express Congress's Intent To Criminalize Only Active Employment Of A Firearm To Commit The Predicate Offense

As this Court often has explained, "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Section 924(c)(1) provides in pertinent part:

> Whoever, *during and in relation to* any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed *by the use of* a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, *uses or carries* a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years * * *.

18 U.S.C. § 924(c)(1) (emphasis added). The five-year term of imprisonment under Section 924(c)(1) for a first use of a firearm may not be suspended and must run consecutively with "any other term of imprisonment including that imposed" for the predicate offense. *Ibid.* The government must make two distinct showings to obtain a conviction under Section 924(c)(1): that the defendant "used" or "carried" a firearm; and that such use or carrying was both "during *and* in relation to" a "crime of violence or drug trafficking crime." *Smith*, 113 S. Ct. at 2053 (emphasis added).

In *Smith*, the Court considered the meaning of these requirements. The defendant met with an undercover agent and sought to exchange a machine gun for cocaine. In concluding that the defendant "used" the machine gun, the majority relied on the ordinary meaning of the word "use," the surrounding language in Section 924(c)(1), and the language and structure of Section 924 as a whole. 113 S. Ct. at 2053-2058. With regard to the independent requirement that the use be contemporaneous with ("during") and "in relation to" the predicate offense, the Court observed that this phrase is "expansive" and, "at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime." *Id.* at 2058-2059. The Court concluded, however, that it "need not determine the precise contours" of this requirement because "petitioner's use of his MAC-10 meets any reasonable construction of it": the gun "was an integral part of the transaction"; "[w]ithout it, the deal would not have been possible." *Id.* at 2059 (internal quotations omitted).

Properly interpreted, the operative language of Section 924(c) at issue in this case – whether petitioners "used" the firearms in question "during and in relation to" the predicate offenses – denotes the active employment of the weapon to accomplish the unlawful acts that constitute the predicate offense. As this Court explained in *Smith*, the word "use" is nowhere defined in Section 924 and thus must be construed in accord with its ordinary and natural meaning. 113 S. Ct. at 2054 (citing *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). In ordinary usage, the word "use" connotes action or activity. See *United States* v. *Long*, 905 F.2d 1572, 1576 (D.C. Cir.) (Thomas, J.) (acknowledging word's "conventional, active connotation"), cert. denied, 498 U.S. 948 (1990); *United States* v. *McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting) ("the ordinary meanings of the words 'use' and 'carry' * * * connote activity beyond simple possession"); *id.* at 468 ("[c]ourts might have interpreted 'use' by insisting upon *activity* with the gun, such as firing it or brandishing it, or, at least, displaying it [ ]or even trading it for drugs"). In consulting various dictionaries to discern that meaning, the Court in *Smith* noted that "use" is variously defined as "'to convert to one's service' or 'to employ'" (113 S. Ct. at 2054, quoting *Webster's New International Dictionary of English Language* 2806 (2d ed. 1949)), or "'[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; [or] to carry out a purpose or action by means of'" (*ibid.*, quoting *Black's Law Dictionary* 1541 (6th ed. 1990)). All of these definitions suggest action or activity.

Of course, the word "use" cannot be "viewed in isolation" but rather must be interpreted "in light of the terms that surround it." *Smith*, 113 S. Ct. at 2054-2055. The surrounding language includes a second appearance in the very same sentence containing the operative language: after describing the eligible predicate offenses as "any crime of violence or drug trafficking crime," the statute clarifies that this "includ[es] a crime of violence or drug trafficking crime which provides for an enhanced punishment if *committed by the use of* a deadly or dangerous weapon or device." 18 U.S.C. § 924(c)(1) (emphasis added). In this second appearance, the word "use" conveys the unmistakable suggestion of active employment to carry out the underlying offense. See also pp. 19-21, *infra*; J.A. 109-112 (Williams, J., dissenting).[4]

The pertinent context also necessarily includes the word's exclusive direct object ("a firearm"), since firearms are capable of being used in only so many ways; its companion term ("carries"), which suggests the kind of conduct Congress intended to crimina-

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[4] The en banc majority relied heavily on *Astor* v. *Merritt*, 111 U.S. 202 (1884), a century-old case involving "use" of wearing apparel under the customs laws that was cited in passing in *Smith* (see 113 S. Ct. at 2054) for the proposition that a "more inclusive understanding of 'use' has long been recognized in the jurisprudence of the Supreme Court." J.A. 94. That case, however, has little or no relevance to the issue presented here. See J.A. 108-109 (Williams, J., dissenting).

lize and must have some meaning independent of "use"; and the requirement that any "use" or "carrying" of a firearm bear a certain temporal and functional relationship ("during and in relation") to a specific predicate offense. Of particular significance is the term "carry," which specifies an alternative basis for liability. The plain meaning of the word "carry" is "[t]o have or keep on one's person (*carry a gun*)." *Webster's II New Riverside University Dictionary* 233 (1988) (emphasis altered).[5]

Any definition of "use" that renders superfluous the alternative element of "carrying" a firearm is inconsistent with the tenet that each word in a statute must be given effect. *United States Department of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2210 n.6 (1993); see also *Ratzlaf* v. *United States*, 114 S. Ct. 655, 659 (1994) (concern over treating statutory terms as surplusage is "heightened when the words describe an element of a criminal offense"). Defining "use" as active employment of a firearm to commit the predicate offense preserves a meaningful role for "carrying" liability: one can "use" a firearm without carrying it (as by displaying or referring to a firearm not borne on one's person, or by trading a firearm for drugs without handling it). Although many instances of use will also involve carrying, the same is true of the D.C. Circuit's "proximity and accessibility" test for use. See J.A. 119 (Williams, J., dissenting) (majority's

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[5] Under a somewhat broader definition in *Webster's*, "carry" incorporates an element of movement together with an element of immediate accessibility. Thus, "carry" can mean "[t]o bear [an object] from one place to another" while "hold[ing] or be[ing] capable of holding" the object. *Webster's II New Riverside University Dictionary* 233 (1988). See also *The New Shorter Oxford English Dictionary* 343 (1993) (defining "carry" to include an element of movement as well as "hav[ing] [the object] with or beside one as one moves"). There is no basis on which a jury could properly have concluded that either Bailey or Robinson "carried" a firearm during and in relation to the predicate offense of possession of a controlled substance with intent to distribute it. Not a single member of the en banc court suggested otherwise, and Judge Williams's dissent explained in detail why Bailey's action in "transporting" a gun in the trunk of his car did not qualify as "carrying." J.A. 117-119.

"expansive view of 'use' virtually emasculates the role of the term 'carry' in the statute").

Any definition of "use" should also bear some logical relationship to "carry," so that it is possible to see why Congress would have singled out those two kinds of activity for stiff mandatory penalties (rather than letting the conduct be punished through a two-level enhancement under the Sentencing Guidelines).[6] The D.C. Circuit majority failed to consider the relationship between "use" and "carry," and it is difficult to imagine why Congress would have singled out for punishment situations where a defendant, during the predicate offense, either (1) bears a firearm on his person (or moves in tandem with the firearm in circumstances where the firearm is within easy reach); or, according to the D.C. Circuit's test, (2) constructively possesses a firearm that is situated near the drugs, drug paraphernalia, or drug proceeds involved in the underlying offense and is accessible *from that location* (regardless of whether it is accessible to the defendant). J.A. 80, 101. In contrast, the definition of "use" we propose preserves a logical relationship between the two bases of liability. It is perfectly sensible that Congress wanted to criminalize not only instances where a firearm is actively employed in the commission of a crime of violence or drug-trafficking offense, but also cases where a firearm is "carrie[d]" "in relation to" the predicate offense (*i.e.*, carried with the intent to use it should the need arise).

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[6] Under Section 2D1.1(b)(1) of the Sentencing Guidelines, a two-level enhancement is applied to anyone convicted of certain drug-trafficking offenses (including possession with intent to distribute) if "a dangerous weapon (including a firearm) was possessed" during the offense. The Guidelines' two-level enhancement for "possession" is a more calibrated means of punishment than the blunt mandatory minimum punishment of Section 924(c), because the enhancement is added to a number that already reflects the seriousness of the crime in light of such factors as the amount of drugs involved in the predicate offense and the criminal history of the specific offender. See, *e.g.*, U.S.S.G. §§ 2D1.1(a)(3), 2D1.1(c); *McFadden*, 13 F.3d at 467-468 (Breyer, C.J., dissenting). The two-level enhancement does not apply if the defendant is also convicted under Section 924(c). See U.S.S.G. § 2K2.4 application note 2, § 3D1.1 application note 1.

What is more, our proposed definition of "use" uniquely preserves the proper *relationship* between "use" and "carrying" liability. As Judge Williams correctly noted, Congress "saw 'use' as a *comparatively narrow* term, with 'carry' picking up cases of an alternative type of activity, where the defendant did not actively 'use' the weapon." J.A. 112 (emphasis added). This reading finds ample support in the legislative history of Section 924(c).[7]

Indeed, the Solicitor General has previously acknowledged this relationship between the "use" and "carry" elements in Section 924(c). In *McLaughlin* v. *United States*, 476 U.S. 16 (1986), a case holding that an unloaded firearm could be a "dangerous weapon" under 18 U.S.C. § 2113(d), the Solicitor General's brief took note of the 1984 amendments to Section 924(c) and stated: "It appears that Congress is of the view that *something more than the carrying of a gun* is required to establish its use." U.S. Br. 19 n.18 (No. 85-5189) (emphasis added). The Solicitor General further explained that Section 2113(d), which imposes additional penalties for bank robbery committed "by the use of a dangerous weapon or device," would not cover an armed robber who "approaches a bank teller and demands money, without displaying a weapon," because "the robber has not 'used' the weapon to 'assault' anyone, as Section 2113(d) requires." *Id.* at 18-19. See also J.A. 113-115 (dissenting opinion) (discussing *McLaughlin* brief).

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[7] See H.R. Rep. No. 495, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S.C.C.A.N. 1327, 1336 (expressing concern that a "self-defense" exception might "decimate[ ]" the "'carrying' branch of the offense * * * in that the felon could claim that he was only carrying the weapon for defense against other felons, and cite the fact that he did not actually *use* the weapon as proof of his claim"); S. Rep. No. 225, 98th Cong., 2d Sess. 314 n.10 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492 n.10 ("Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant *intended to use* the gun if a contingency arose or to make his escape.") (emphasis added); 114 Cong. Rec. 27,144 (1968) (Sen. Murphy) (praising an amendment on ground that it "will make every criminal and would-be criminal think twice before using *or even carrying* a firearm") (emphasis added).

Finally, a proper understanding of "use" must account for the requirement that the firearm use occur "during and in relation to" the predicate offense – here, possession of a controlled substance with intent to distribute it. The word "during" suggests that "use" signifies something whose time of occurrence can be identified and proved.[8] *Active* employment fits that description; the D.C. Circuit's proximity and accessibility tests do not.

B. The Structure Of Section 924 As A Whole Confirms This Interpretation

"[T]he meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Each term in a statute should be read in light of the surrounding provisions of the law as a whole. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 114 S. Ct. 517, 523 (1993). Although Congress's intent not to penalize anything less than the active employment of a firearm to accomplish the predicate offense is discernible from the language and structure of Section 924(c)(1), "[t]o the extent there is any uncertainty" on this score, "the remainder of § 924 appropriately sets it to rest." *Smith*, 113 S. Ct. at 2056.

In *Smith*, this Court relied on Section 924(d)(1), which authorizes the forfeiture of firearms and ammunition that are "involved in or used in" certain offenses and "intended to be used" in other offenses. 18 U.S.C. § 924(d)(1); see also *id.*

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[8] To the extent that firearm "uses" are not limited to discrete events (such as an instance of firing, brandishing, pointing, or trading of the weapon), additional problems may arise in the administration of the statute. See *United States* v. *Anderson*, 39 F.3d 331, 360 (D.C. Cir. 1994) (Silberman, J., dissenting) (noting that under majority's holding – that each "use" of a firearm during and in relation to the predicate offense is a separate violation of Section 924(c) – "if a defendant were charged with possession of drugs with intent to distribute and kept a gun in a chest, each time he indulged the impulse to fondle the gun so as to embolden his criminal determination, *see United States v. Bailey*, 36 F.3d 106, 114, 116 * * *, he would have committed a fresh section 924(c)(1) violation * * * [and] it would not be unusual for the government to obtain, as a practical matter, a life sentence whenever a gun accompanies a drug crime"), rehearing en banc granted, 39 F.3d 331, 361 (1995).

§ 924(d)(2)(C) (same). Because some of the listed offenses include use of a weapon as an item of barter, the Court reasoned, Congress must have intended the word "use" to include trading a weapon for drugs. 113 S. Ct. at 2056-2057. Here, by contrast, there is not the slightest indication in Section 924(d) that Congress envisioned as "use" passive relationships such as those involved in these cases. On the contrary, Section 924(d) squarely supports our definition of "use." As explained above, the forfeiture provision makes express reference to firearms that are "used in" or "involved in" any knowing commission of certain offenses, as well as to firearms that are merely "intended to be used in" other offenses. This demonstrates Congress's acute awareness of the distinction between actual use and potential or intended use.[9] If Congress had meant Section 924(c) liability to attach whenever a firearm was "involved in" a predicate offense or a defendant "intended to use" a firearm during that offense, Congress could have said as much. See J.A. 112 (Williams, J., dissenting) ("Congress * * * provided for forfeiture *before* the weapon was used * * * apparently saving § 924(c)'s five years additional imprisonment for cases of actual use").

Moreover, all of the offenses cross-referenced in Section 924(d)(3) involve firearm "uses" falling squarely within the definition we propose.[10] This was not true of the definition of "use" rejected in *Smith* ("use as a weapon"): the offenses listed in Section 924(d)(3) include some "in which the firearm is *not* used as a weapon but instead as an item of barter or commerce." 113

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[9] See also 18 U.S.C. § 924(e)(2)(B) (defining "violent felony" as including acts of juvenile delinquency involving "the use or carrying of a firearm, knife, or destructive device" where the predicate offense "has as an element the *use, attempted use, or threatened use* of physical force against the person of another") (emphasis added); *id.* § 924(h) (penalizing transfers of certain firearms that "will be used" to commit drug-trafficking offenses).

[10] As Judge Williams's dissent observes, the parallelism between "use[s]" under Section 924(c) and "inten[ded] * * * use[s]" under Section 924(d) "may not be complete" because in Section 924(c) the term shares company with "carry" whereas in the portion of 924(d) that is relevant for this analysis it does not. See J.A. 113.

S. Ct. at 2057. By contrast, in all the examples given in *Smith* – manufacturing, receiving, transferring, delivering, shipping, exporting, importing, and transporting – the firearm not only is actively employed to carry out the crime, but also is itself a necessary part of the actus reus. See *id.* at 2057 n.*; see also 18 U.S.C. §§ 922(a)(1), 922(a)(3), 922(a)(5), 922(b)(3), 922(d), 922(i), 922(j), 922(*l*), 922(n), 924(b). As this Court has ruled (*Smith*, 113 S. Ct. at 2057), "using a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)."

Also instructive is Section 924(a)(5)(B)(ii), which penalizes the sale, delivery, or other transfer of a handgun or ammunition by an adult to a juvenile if the adult knows or has reasonable cause to know that the juvenile "intended to *carry or otherwise possess* or *discharge or otherwise use* the handgun or ammunition in the commission of a crime of violence." 18 U.S.C. § 924(a)(5)(B)(ii) (emphasis added). This provision reflects Congress's understanding of "carry[ing]" as a specific kind of possession (bearing on one's person), and "discharg[ing]" as a specific kind of use. It also suggests that Section 924(c), which lacks the phrase "or otherwise possess," reaches only one type of possession – carrying. Moreover, under the rules of *ejusdem generis* and *noscitur a sociis*, the phrase "discharge or otherwise use" takes on a special significance: the general term "use" that follows the specific term "discharge" must describe a category of deployments of the weapon that are similar in kind to discharging. *Cleveland* v. *United States*, 329 U.S. 14, 18 (1946). That category consists of other active employments of a firearm to carry out the predicate offense.[11]

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[11] See also H.R. Conf. Rep. No. 3355, 103d Cong., 2d Sess. 421, *reprinted in* 1994 U.S.C.C.A.N. 1839, 1858-1859 (in report accompanying Section 924(a)(5)(B)(ii), stating that "ready availability of guns to young people results in the acceptability of their *random use*") (emphasis added); 18 U.S.C. § 924(i) (imposing penalties on "[a] person who, in the course of a violation of subsection (c), causes the death of a person through the *use of a firearm*") (emphasis added).

C. The Origins And Legislative History Of Section 924(c)(1) Demonstrate Congress's Intent To Penalize Only Active Employment Of A Firearm To Commit The Predicate Offense

Because the language and structure of Section 924 demonstrate that "use" of a firearm "during and in relation to" a "crime of violence or drug trafficking crime" covers only the active employment of the weapon to accomplish the underlying offense, there is no need to consult the legislative history of the provision. If the Court concludes, however, that Section 924(c)(1)'s meaning is ambiguous, then we submit that such ambiguity is dispelled by a careful examination of the statute's origins and legislative history.

Originally enacted as part of the Gun Control Act of 1968, Section 924(c) has been amended many times. Nevertheless, only three of those amendments (in 1984, 1986, and 1988) bear on the scope of liability for "us[ing] or carry[ing]" a firearm. As we next explain, Congress intended in passing the 1968 Act to limit "use" to active employment to carry out the predicate offense; and there is nothing in the legislative record to suggest (and much that refutes) any claim that the 1984, 1986, or 1988 amendments were intended to broaden the scope of "use" liability.

1. *The Gun Control Act of 1968.* In the summer and fall of 1968, Congress, responding to a precipitous rise in political assassinations, riots, and other violent crimes involving guns, passed two laws in quick succession: the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; and the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224.[12] Congress debated and passed the latter statute in the immediate aftermath of the assassinations of Senator Robert F. Kennedy and Dr. Martin Luther King, Jr. See *Busic* v. *United States*, 446 U.S. 398, 404 n.9 (1980).

Section 924(c) was directly addressed to alleviating the problem of violent crime. In pertinent part, it provided:

[12] See H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7, *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412-4413; S. Rep. No. 1501, 90th Cong., 2d Sess. 22-23 (1968).

> Whoever – (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less that one year nor more than 10 years.

Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224. For several reasons, it is clear that Congress intended Section 924(c) to criminalize only the active employment of a firearm to carry out a predicate offense.

First, as Judge Williams correctly noted (J.A. 110), the statutory language strongly "suggests that Congress had active employment of a weapon in mind." Judge Williams explained:

> The phrase "uses *to commit*" implies that the defendant derived actual service from the weapon in completing an unlawful act. This service might take the form of injuring one's opposition by firing it, intimidating opponents by displaying or brandishing it, or offering it in exchange to complete an unlawful commercial transaction. It does not, however, imply merely potential service – i.e., keeping it hidden from view, intending to use it only if a contingency should arise.

J.A. 110 (dissent).

Second, the legislative history – "sparse" though it may be[13] – confirms Congress's intent to penalize only active employ-

[13] *Simpson* v. *United States*, 435 U.S. 6, 15 (1978); see *id.* at 13-14 (describing origins of provision). The "use or carry" provision originated in the House as a floor amendment proposed by Representative Poff only six weeks after Senator Kennedy's assassination. 114 Cong. Rec. 22,231 (1968); see also *id.* at 21,785-21,786. The Poff amendment, whose operative language ultimately appeared in the statute, was passed by the House (see *id.* at 22,248, 23,094) instead of an alternative amendment proposed by Representative Casey. See *id.* at 22,229, 21,765-21,766, 21,770. Representative Poff noted that his amendment "is a substitute for the Casey amendment, but it is not in derogation of the Casey amendment." *Id.* at 22,231. The House bill's provision was later adopted by a conference committee in lieu of an analogous provision of

ment of firearms to commit federal offenses. Several Members of Congress expressed the view that the statute should penalize "use" either instead of, or in addition to, "carry[ing]" of a firearm, and their remarks made clear the view that the word "use" was appropriate precisely because it was more *active* than carrying.

Representative Casey, for example, stated that, if the statute penalized "use" but not "carrying," the provision would "apply only to those who *actually use* a gun *in the commission of* the offenses enumerated." 114 Cong. Rec. 22,229-22,230 (1968) (emphasis added). In support of an amendment to delete the word "carries," Representative Dowdy stated:

> I believe that the onus should be the use of a firearm in the commission of a crime. The fact that a person might be carrying a firearm could very well not have anything to do with the commission of a crime if the gun is not used or exhibited. Of course, exhibiting would be using the gun in the commission of a crime, and that is where the burden should be on the use of a gun in the commission of a crime.

Id. at 22,235. Similarly, Representative Harsha criticized a version of the bill for "requir[ing] those merely having a gun in their possession to be subject to the same penalties as those who *actually use* that weapon in the commission of a crime." *Id.* at 22,234 (emphasis added). And Representative Dole praised another version for "materially aid[ing] police and prosecutors in obtaining convictions and prison terms for the offender who *uses a firearm in the performance of a Federal felony*." *Id.* at 22,762

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the Senate bill that had been added by Senator Dominick. See *id.* at 27,141-27,142 (1968); H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 12, 31-32, *partially reprinted in* 1968 U.S.C.C.A.N. 4410, 4426. The Casey amendment provided in pertinent part that "whoever *during the commission of* any robbery, assault, murder, rape, burglary, kidnaping, or homicide (other than involuntary manslaughter), *uses or carries* any firearm which has been transported in interstate or foreign commerce shall be imprisoned" for specified terms. 114 Cong. Rec. 22,229 (emphasis added). Senator Dominick's amendment imposed penalties on anyone who, "*while engaged in the commission* of any offense which is a crime of violence punishable under this title, *is armed with any firearm*." *Id.* at 27,142 (emphasis added).

(emphasis added); see also *ibid.* ("a deterrent to felonies *committed with a weapon*") (emphasis added).[14]

2. *The Comprehensive Crime Control Act of 1984.* In 1984, Congress amended Section 924(c)(1) to read, in pertinent part, as follows:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138-2139. Among other things, the amended statute eliminated the requirement that the firearm be carried "unlawfully," added the requirement that it be carried or used "during and in relation to" the predicate offense, and deleted the words "to commit" from the phrase "uses to commit."

As Judge Williams observed, there is "no evidence" that, in amending the statute in 1984, "Congress sought to expand the meaning of 'use.'" J.A. 111 (dissent). On the contrary, the available evidence demonstrates that Congress's *only* purposes were to address "drafting problems" and "interpretations of the section in recent Supreme Court decisions" that had "greatly reduced its

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[14] References by other Members of the House reflect a similar understanding of firearm "use." See, *e.g.*, 114 Cong. Rec. at 21,788-21,789 (Rep. Scheuer) (asking whether police officer who is convicted of assault would be subject to enhanced penalty if officer "push[ed] somebody in the street or punch[ed] somebody in the nose – with *no use of the pistol*, but merely carrying the pistol as [the officer] is licensed to do – *in no way bringing the pistol into any aggressive act*"); *id.* at 22,239 (Rep. Pucinski) (Casey amendment would, "for the first time, make a criminal who *takes a gun in his hand* realize that he is going to be prosecuted to the fullest extent of the Federal law") (emphasis added); *id.* at 22,247 (Rep. Horton) ("When a person commits a crime with a firearm, he *uses his weapon to terrorize* his victim with the threat that, with the flick of his finger, he can snuff out one or more innocent lives.") (emphasis added).

effectiveness as a deterrent to violent crime." S. Rep. No. 225, 98th Cong., 1st Sess. 312 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490; see also *id.* at 313, 1984 U.S.C.C.A.N. at 3491 (the amendment was made "to overcome the problems with the present subsection discussed above [*i.e.*, in the report]"); J.A. 110-111 (noting significance of this language). The "drafting problems" Congress wished to correct pertained to sentencing, not the definition of the offense. S. Rep. No. 225 at 313, 1984 U.S.C.C.A.N. at 3491. And the decisions of this Court that Congress wished to undo were *Busic* v. *United States*, 446 U.S. 398 (1980), and *Simpson* v. *United States*, 435 U.S. 6 (1978). See S. Rep. No. 225 at 312-313, 1984 U.S.C.C.A.N. at 3490-3491. In view of this discussion in the Senate Report accompanying the legislation, there is no reason to believe that Congress sought to expand the definition of "use," and every reason to conclude that it did not.

In fact, most of Congress's revisions to the statute that affect liability for firearm "use" can be readily explained by Congress's goal of overturning *Simpson* and *Busic*. In *Simpson*, this Court held that a defendant may not be sentenced under both Section 924(c) and a sentence enhancement provision in the predicate offense. 435 U.S. at 16. In *Busic*, the Court held that a defendant may not be prosecuted under Section 924(c) if the predicate offense itself contains an enhancement provision. 446 U.S. at 399-400. To overturn those holdings, Congress inserted the following qualifying phrase after "crime of violence": "including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Apparently to avoid repeating this cumbersome phrase, Congress consolidated subsections (1) and (2) into a single section. And, once that consolidation occurred, it would of course have been ungrammatical to retain the full phrase "use to commit" in lieu of "use."[15]

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[15] This reading is confirmed by the Justice Department's analysis of S. 829, the Administration's bill that contained the provision that later became the 1984 amendment to Section 924(c). See *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary*, 98th Cong., 1st Sess. 116, 199 & n.2 (1983) (*S. 829 Hearings*); see also 129 Cong. Rec. 22,883, 22,906 (1983). According to the Justice Department, the pertinent language originated in S. 2572, a bill that had been passed in 1982 but vetoed by President Reagan. *S. 829 Hearings* at 199.

The Senate Report did discuss, in a lengthy footnote, additional changes made by the 1984 amendment to liability for *carrying* a firearm – including omission of the requirement that the carrying be "unlawful[ ]" and addition of a requirement that it be "in relation to" the predicate offense. The Report explained:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant *intended to use* the gun if a contingency arose or to make his escape. The requirement in present section 924(c) that the gun be carried unlawfully, a fact usually proven by showing that the defendant was in violation of a State or local law, has been eliminated as unnecessary. The "unlawfully" provision was added originally to section 924(c) because of Congressional concern that without it policemen and persons licensed to carry firearms who committed Federal felonies would be subjected to additional penalties, even where the weapon *played no part in the crime*, whereas the section was directed at persons who *chose to carry a firearm as an offensive weapon for a specific criminal act*. * * * Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence *played no part in the crime*, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

S. Rep. No. 225 at 314 n.10, 1984 U.S.C.C.A.N. at 3492 n.10 (citation omitted) (emphasis added).

This passage is highly instructive. The highlighted language confirms Congress's intent that Section 924(c) reach only the active employment of a firearm to carry out a predicate offense. The first sentence, moreover, strongly suggests that Congress believed that "use" of a firearm consists of actions such as firing, displaying, or referring to the weapon during the predicate offense. In alluding to the possibility that circumstances might demonstrate

that a "defendant intended to use the gun if a contingency arose or to make his escape," the Report necessarily has in mind a concept of "use" that is active and could not include, for example, mere possession of the weapon for protection.[16] Furthermore, it indicates that even immediate access to a firearm (such as carrying it on one's person) is an insufficient basis for liability unless the gun played a direct role in the predicate offense.

The Committee did not mention any change to "use" liability occasioned by the addition of the phrase "during and in relation to." That fact is hardly surprising, however, once it is recognized that those requirements are *already implicit* in the concept of "use" Congress intended the statute to reflect both before and after the 1984 amendment – active employment of a firearm to carry out the predicate offense. See *United States* v. *Stewart*, 779 F.2d 538, 539-540 (9th Cir. 1985) (Kennedy, J.) (holding that "in relation to" requirement was implicit in pre-1984 version of statute with regard to carrying liability), cert. denied, 484 U.S. 867 (1987). In this connection, it is significant that S. 2572, a precursor bill passed but vetoed in 1982 (see note 15, *supra*), would have added to "carrying" but not to "use" liability the requirement that the predicate felony include as an element "the use of violence or threat of imminent violence as defined in section 16 of this title." See 128 Cong. Rec. 26,581, 26,610 (1982). Here again, there was no need to add that qualifier to the provision for "use" liability, since the idea of imminent violence was *already implicit* in the requirement that a firearm be "used."[17]

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[16] Discussing this passage in his dissent, Judge Williams correctly observed that "[t]he reference to *intended use* shows that Congress envisioned the 'carry' provision to punish a defendant who did not 'display' or otherwise actively use the firearm, but who had at least taken the active step of carrying the gun on a drug trafficking foray." J.A. 112 (emphasis added). "Thus the Senate evidently saw 'use' as a comparatively narrow term, with 'carry' picking up cases of an alternative type of activity, where the defendant did not actively 'use' the weapon." J.A. 112.

[17] Moreover, insofar as Congress intended to change the scope of *carrying* liability by adding the phrase "in relation to," Congress clearly meant to *limit* the statute's reach not, as the D.C. Circuit concluded (see note 3, *supra*), to expand it.

Finally, as Judge Williams observed (J.A. 111), the only two examples of using a firearm in violation of Section 924(c) mentioned in Senate Report 225 are both "active": "pointing it at a teller or otherwise displaying it whether or not it is fired." S. Rep. No. 225 at 314, 1984 U.S.C.C.A.N. at 3492. This suggests that Congress intended the statute, as amended, to continue to penalize as a "use" only the active employment of a firearm to carry out a crime. See also J.A. 111 ("While these examples were not presented as exhaustive, they provide insight into the general class of behavior Congress had in mind."). That intent, of course, is fully consistent with Congress's overarching purpose of addressing the serious problem of violent crime.

Thus, there is no basis for concluding that Congress intended to expand the meaning of "use" by amending the statute in 1984. And, of course, "Congress's adoption of the connective phrase 'during and in relation to' could not have been intended to adjust for evolving problems of passive drug crimes" because "Congress only added drug trafficking offenses as predicate crimes in 1986." J.A. 111 (Williams, J., dissenting).

3. *The Firearm Owners' Protection Act of 1986.* In 1986, Congress once again amended Section 924(c)(1). Pub. L. No. 99-308, § 104, 100 Stat. 449, 457. Congress expanded the definition of predicate offense from "crime[s] of violence" to include any "drug trafficking offense" and defined the latter as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance." *Ibid.*

The legislative history of the 1986 law confirms Congress's intent to continue to punish under the "use" prong of Section 924(c) only active employment of the weapon to carry out the predicate offense. To begin with, the accompanying House Report in no way suggests an intent to expand the meaning of firearm "use" occurring "during and in relation to" a predicate offense. See H.R. Rep. No. 495, 99th Cong., 2d Sess. 27, 1986 U.S.C.C.A.N. 1327, 1353. Although Congress obviously intended to expand the eligible predicate offenses to include felony drug-trafficking crimes, this change, according to the Administration's own analysis of the legislation, was needed to "resolve the current uncertainty whether such crimes are crimes of violence." Assessment of Bureau of Alcohol, Tobacco, and Firearms,

reprinted in H.R. Rep. No. 495 at 17-18, 1986 U.S.C.C.A.N. at 1343-1344 (emphasis added).

Other passages in the House Report demonstrate that Congress did not intend to broaden the meaning of firearm "use." In explaining the rejection of a "self-defense" exception to Section 924(c), the House Report explained:

> Proponents of the self-defense amendment point out that the defense is not available to one protecting himself "from the danger which was the direct result of the commission of or attempt to commit a felony." They argue that a felon who *uses* a gun in the commission of a felony or in a shoot out with police while fleeing cannot therefore claim self-defense, since he is protecting himself from a danger that was the direct result of the felony.
>
> While this reasoning may rule out a successful self-defense claim in most situations in which the *use* branch of the offense forms the basis for the mandatory penalty prosecution, it would not have the same weight in the prosecution for *carrying* a firearm during the commission of a felony. Indeed, the "carrying" branch of the offense might be decimated, in that the felon could claim that he was only carrying the weapon for defense against other felons, and cite the fact that he did not actually *use* the weapon as proof of his claim. For example, a drug trafficker, if charged with carrying a firearm under 18 U.S.C. 924(c) in connection with drug trafficking, might be able to reasonably sustain a claim that it was carried for protection against rival traffickers.

H.R. Rep. No. 495 at 10, 1986 U.S.C.C.A.N. at 1336. A broad definition of "use," for example, cannot be reconciled with the committee's statement that in "*most situations*" in which "use" liability attaches the proposed self-defense provision would be unavailable because a defendant himself has created the danger by "*us[ing]* a gun in the commission of a felony *or in a shoot out with police while fleeing*." *Ibid.* (emphasis altered). Similarly, the committee's recognition that a felon who was carrying a weapon could often invoke the defense by claiming "that he was only carrying the weapon for defense against other felons," and citing "the fact that he did not actually *use* the weapon," suggests a

narrow understanding of the word "use" – one that would *not* include carrying a weapon for protection. Finally, the specific example contained in the final sentence of the text quoted above demonstrates beyond dispute that the House Judiciary Committee believed that a drug trafficker who carries a firearm for the purpose of protecting himself against "rival traffickers" would not be subject to liability under Section 924(c) for "use" of that firearm. If credited, that statement forecloses "use" liability when a weapon is merely possessed for protection.

The majority below (see J.A. 97) attached significance to another passage of the House Report (appearing immediately before the discussion of the self-defense proposal just quoted) in which the Judiciary Committee explained its decision not to add the phrase "in furtherance of any such crime of violence" to the *carrying* branch of Section 924(c) liability. See H.R. Rep. No. 495 at 9, 1986 U.S.C.C.A.N. at 1335. In rejecting that proposal as "unnecessary to prevent injustice," the committee noted that the proof of the new element "would involve additional analysis of the defendant's conduct, the circumstances *of the violent crime* and evidence of the defendant's state of mind." *Ibid.* (emphasis added). According to the majority below (J.A. 97-98), the committee's rejection of this amendment shows that "Congress carefully avoided any implication that it intended to narrow the relationship that must be shown between the gun and the predicate offense in order to support a conviction under § 924(c)(1)."

But that is true only with respect to *carrying* liability. As the subsequent discussion in the House Report of the self-defense proposal makes clear, the Judiciary Committee was acutely aware of the distinction between "use" and "carry" liability. Accord S. Rep. No. 583, 98th Cong., 2d Sess. 22 (1984) (discussing "in furtherance requirement" to be added by S. 914 to "carrying" liability). More fundamentally, the majority's reasoning rests on the mistaken assumption that the "in furtherance" language would have modified both "use" and "carry." But see S. 49, § 104, 99th Cong., 1st Sess. (1985) ("uses a firearm, or carries a firearm in furtherance of any such crime of violence"). Since the concept of "use" already embodied in Section 924(c)(1) included the idea of employment of the weapon "in furtherance of" the predicate

offense, there was simply no reason to alter the operative language relating to "use" liability.

Thus, there is no evidence in the legislative materials that Congress in 1986 intended to broaden the notion of firearm "use" (and much contrary evidence). Nor is it even clear that Congress intended to include passive drug-trafficking crimes as predicate offenses in 1986. After all, the 1986 amendment defined "drug traffic offense[s]" in a way that appeared to *exclude* such passive offenses – as "any felony violation of Federal law involving the *distribution, manufacture, or importation* of any controlled substance." Pub. L. No. 99-308, § 104, 100 Stat. 457 (emphasis added). And the House Report, at least, suggested that Congress meant simply to clarify that drug-trafficking offenses could qualify as crimes of violence. Only in 1988 was the definition of "drug trafficking crime" changed to read as it now does.

4. *The Anti-Drug Abuse Act of 1988.* Congress broadened the definition of "drug trafficking crime" in 1988 to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360. Congress thus made clear for the first time that a "drug trafficking offense" includes not just the more active crimes of distribution, importation, and manufacture but also passive crimes such as possession with intent to distribute. We have been unable to find *any* evidence in the slight legislative history of the 1988 Act to suggest that Congress considered, even for a moment, how the "carry" or "use" provision would function when applied to a predicate possessory offense.

In sum, Congress intended in passing the 1968 Act to limit "use" to active employment of a firearm to carry out the predicate offense; there is nothing to suggest that the 1984, 1986, or 1988 amendments were intended to broaden the scope of "use" liability; and indeed there is voluminous evidence in the legislative record to support the conclusion that Congress *continued* to have in mind an active concept of "use."

D. The Rule Of Lenity Supports Petitioners' Construction Of Section 924(c)(1)

Even if the Court were to conclude that the language, structure, and legislative history of Section 924(c)(1) do not compel the interpretation of "use" suggested above, there can be no serious doubt that our interpretation – accepted below by Judges Williams, Silberman, and Buckley – is a reasonable one, and that the statute is therefore *at least* ambiguous. See also *Long*, 905 F.2d at 1576 (Thomas, J.) (acknowledging "conventional, active connotation" of word "use"); *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting) ("[c]ourts might have interpreted 'use' by insisting upon *activity* with the gun, such as firing it or brandishing it, or, at least, displaying it [ ]or even trading it for drugs"). Under the rule of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). That principle is dispositive here.

As the Court recently explained in *United States* v. *Granderson*, 114 S. Ct. 1259 (1994), the rule of lenity should be applied "where text, structure, and history" of a criminal statute "fail to establish that the Government's position is *unambiguously correct.*" *Id.* at 1267 (emphasis added). See also *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987) ("The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."). In light of the text and structure of the statute and the extensive legislative materials just summarized, any interpretation of "use" that includes more than active employment of the firearm to carry out the predicate offense is, surely, not "unambiguously correct."[18]

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[18] As explained in Sections I.A and B above, it is clear that no position other than one requiring active use could be unambiguously correct, even if one ignores the legislative history and considers only the text and structure of the statute, see *United States* v. *R.L.C.*, 503 U.S. 291, 307-311 (1992) (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in the judgment), or considers the text and structure as informed by this Court's decisions and the background rules of statutory

The D.C. Circuit majority did not even mention the rule of lenity, much less attempt to explain why its proposed interpretation of "use" as "proximity and accessibility" is unambiguously correct. Indeed, the majority acknowledged that "'use' *could* be defined *either* narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, *or more broadly*, so as to include the other ways in which a gun can be used to facilitate drug trafficking." J.A. 93 (emphasis added). Without thorough analysis of the provision's "text, structure, and history" (*Granderson*, 114 S. Ct. at 1267), the court rejected the narrower interpretation on the ground that "nothing in the statute indicates that the Congress intended" it. J.A. 93. In addition to misreading Congress's intent, that conclusion violates the rule of lenity by placing the burden on the defendant affirmatively to support *his* (or her) reading of the statute, rather than on the government to prove the unambiguous correctness of its reading.[19]

If "use" of a firearm denotes active employment to carry out the predicate offense, this case is at an end. Petitioners' alleged "uses" of the firearms do not even begin to approach such active employment. Bailey was arrested after police officers found cocaine in the driver's compartment of his automobile. Locked in the trunk of the car, underneath "a whole lot of items," was a bag containing a firearm. There was no evidence – and certainly no evidence to support a finding *beyond a reasonable doubt* – that Bailey had ever used the firearm in any manner – *i.e.*, no evidence that he had *actively employed* it. Moreover, as the gun was

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interpretation, see *id.* at 311-312 (Thomas, J., concurring in part and concurring in the judgment).

[19] Although lenity "does not always require the 'narrowest' construction" of a criminal statute (*R.L.C.*, 503 U.S. at 306 n.6), it cannot seriously be disputed that the lower courts have found the statute's meaning to be something less than clear. If Congress wishes to impose a mandatory sentence of five, ten, twenty, or thirty years, and in some instances life imprisonment, based on firearms "used" in the fashion found by the juries in these cases, it should say so clearly.

neither being borne on Bailey's person nor within his immediate reach, he was not "carrying" the firearm. See note 5, *supra*.

The case against Robinson also fails. Robinson was arrested in her home. The gun that provided the basis for her Section 924(c)(1) enhancement was found at the bottom of a locked footlocker in a bedroom closet and was unloaded. As in Bailey's case, there was no evidence that Robinson had ever actively employed the firearm in any manner. And, as the gun was locked away in another room of the house, it was not being borne on Robinson's person. No rational jury could have concluded beyond a reasonable doubt that Robinson used a firearm in relation to a drug-trafficking crime.

II. WHETHER A DEFENDANT "USED" A FIREARM "DURING AND IN RELATION TO" A SPECIFIC PREDICATE OFFENSE SHOULD, AT A MINIMUM, BE ASSESSED IN LIGHT OF ALL RELEVANT FACTORS

If this Court declines to adopt the definition of "use" set forth above, then it must undertake to define that term by drawing a line somewhere else along the continuum between discharging the weapon on the one hand and mere presence of the firearm during the predicate offense on the other. As a review of the lower courts' decisions in this area demonstrates, "it is easier to see the need to distinguish (drug-crime-related) 'use' from 'possession' than it is to explain just how to make the distinction." *United States* v. *McFadden*, 13 F.3d 463, 468 (1st Cir. 1994) (Breyer, C.J., dissenting). Although it is difficult to describe the line between use and non-use (other than in the manner suggested in Part I above), it is a good deal easier to say what "use" is not. As explained below, several clear limits on the concept of "use" are apparent from the language, structure, and legislative history of Section 924(c), but have been misunderstood by some of the lower courts: *first*, mere possession during the predicate offense is a necessary but not a sufficient condition for firearm "use"; *second*, Section 924(c) criminalizes the "use" of a firearm, but not its mere potential or intended use; *third*, accessibility of the firearm to the defendant, even immediate accessibility, does not in and of itself constitute "use"; and, *fourth*, a defendant does not "use" a firearm "in relation to" a predicate offense merely by having it sufficiently nearby or available that it can be said to "embolden" him.

Once these limits on "use" liability are recognized, it is clear that the D.C. Circuit's "proximity and accessibility" test is erroneous and should be rejected. That test sweeps in many cases that rest outside several of the foregoing boundaries. It can also produce absurd results, as Judge Wald explained in her dissent. J.A. 104-105. And it permits an appellate court to conclude that "use" has been proved beyond a reasonable doubt without regard to several factors that are relevant (and potentially dispositive) on that issue. We submit that all of the following are relevant to determining whether a gun was "used": (1) the accessibility of the firearm to the defendant, (2) any proof of an actual drug transaction during which the firearm was actively employed, (3) the type, condition and number of firearms involved; (4) whether the firearm was loaded and ready to fire; and (5) expert testimony concerning the government's particular theory of use. These factors, moreover, should be assessed in light of the specific nature of the predicate offense. Once the evidence in petitioners' cases is reviewed in light of *all* of these factors, it is manifest that their convictions should be reversed.

A. The Language, Structure, And Legislative History Of Section 924(c) Demonstrate That Congress Intended Several Important Limitations On The Concept Of Firearm "Use"

1. Possession Is Necessary But Not Sufficient To Show "Use" Of A Firearm

Many of the lower federal courts (including the D.C. Circuit, see J.A. 82) have recognized that mere possession of a firearm during and in relation to a predicate offense is not enough to qualify as "use." See, *e.g.*, *United States* v. *Wilson*, 884 F.2d 174, 177 (5th Cir. 1989). On the other hand, this principle has not been universally acknowledged. See, *e.g.*, *United States* v. *Paz*, 927 F.2d 176, 179 (4th Cir. 1991). For several reasons, the Court should recognize this important limit on the concept of "use."

First, the word "use" carries "a more active meaning – a meaning that excludes simple (drug-crime-related) possession." See *McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting). Second, if mere possession of a firearm qualified as "use," there would be

no reason for the statute to mention "carry" as an independent basis for liability. As explained above (at page 16 and note 5), "carrying" is a particular kind of possession – bearing on one's person, or having within one's immediate reach while moving together with the object. Thus, interpreting "use" to mean mere possession violates the principle that each word in a statute must be given effect. *United States Department of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2209-2210 (1993).

Third, Congress obviously knows how to criminalize possession and has not done so in Section 924(c). See *McFadden*, 13 F.3d at 467 (Breyer, C.J., dissenting). The criminal statutes relating to firearms are replete with examples of crimes of possession.[20] Perhaps the strongest evidence, moreover, is Section 924(c)'s companion provision, which imposes an enhanced sentence on anyone who, during and in relation to a crime of violence or a drug-trafficking crime, "uses or carries a firearm *and is in possession of* armor piercing ammunition." 18 U.S.C. § 929(a) (emphasis added).

Fourth, as then-Chief Judge Breyer observed in his *McFadden* dissent (13 F.3d at 467), the legislative history of Section 924(c) weighs heavily against equating "use" with "possession." The House Report accompanying the 1986 amendment to Section 924(c), in discussing the "carrying" branch of the statute, gave as an example of someone who might escape liability a drug trafficker who "carried [a weapon] for protection against rival traffickers." H.R. Rep. No. 495 at 10,. 1986 U.S.C.C.A.N. at 1336; see page 30, *supra*. "Such a person quite clearly 'possesses' the weapon with the intent to make active use of it if necessary; yet, the Report adds, 'he did not actually *use* the weapon.'" *McFadden*, 13 F.3d at 467 (dissent). Nor is this the only example in the legislative history that supports this analysis. The Senate Report accompanying the 1984 amendment explained that "the requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a

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[20] See, *e.g.*, 18 U.S.C. §§ 922(g), 922(j), 922(k), 922(*o*)(1), 922(v)(1), 922(w)(1), 922(x)(2), 930(a), 930(b), 930(e)(1).

pocket and never displayed or referred to in the course of a pugilistic barroom fight." S. Rep. No. 225 at 314 n.10, 1984 U.S.C.C.A.N. at 3492 n.10; see page 27, *supra*.

Fifth and finally, if "use" means nothing more than mere possession, then Section 924(c) will essentially "swallow up" the Sentencing Guideline that specifically addresses drug-related gun possession. See U.S.S.G. § 2D1.1(b)(1); *McFadden*, 13 F.3d at 466-468 (Breyer, C.J., dissenting); see also note 6, *supra*. That result, however, would undercut Congress's "effort to create a fairly sophisticated Sentencing Guidelines system that distinguishes among different kinds of criminal behavior and punishes accordingly." *McFadden*, 13 F.3d at 467-468 (Breyer, C.J., dissenting).[21]

Although possession alone is not enough to constitute "use," it is clear that use of a firearm cannot occur without possession. See *United States* v. *Long*, 905 F.2d 1572, 1576-1579 (D.C. Cir.) (Thomas, J.), cert. denied, 498 U.S. 948 (1990). Possession is thus the minimum nexus between the defendant and the weapon necessary to support a conviction.

2. Section 924(c) Criminalizes Use Of A Firearm, Not Mere Potential Or Intended Use

A second important limitation on "use" apparent from the language, structure, and legislative history of Section 924 – and conceded by the Solicitor General in this case – is that "use" of a firearm cannot mean mere "potential use" or even "intended use." See Br. in Opp. 20 ("Section 924(c) requires * * * actual (not future) use" of a firearm). That "use" cannot mean the *potential for use* is apparent for several reasons. In addition to draining every connotation of action from the word "use," that standard would be satisfied in most if not all cases of simple possession of

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[21] To the extent that Section 924(c)'s mandatory minimum provision is an "ad hoc deviation" from Congress's "more general policy" of sentencing as expressed in the Sentencing Guidelines, the Court should seek to avoid reading the term "use" in Section 924(c) "with *unnecessary* breadth." *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting). As explained in Part I above, one way to accomplish that result is to read "use" according to its ordinary meaning.

a firearm. Whenever a firearm is possessed, after all, there is at least some *potential* that it may be employed. But as explained above, whatever else it means, the term "use" cannot encompass instances of mere possession. Allowing "use" to be found when there is only the potential for use would also render the "carrying" prong entirely superfluous. Every time a firearm is carried there is, at least in theory, a possibility that it will be put to use. Had Congress intended "use" of a firearm to encompass all situations where the firearm potentially might be deployed, there would have been no need to mention "carrying" liability.

Equally clear is Congress's desire not to penalize the mere intent to use a firearm – as the Solicitor General has conceded (Br. in Opp. 20) and the panel in *Robinson* correctly recognized (J.A. 53, citing *United States* v. *Bruce*, 939 F.2d 1053, 1055 (D.C. Cir. 1991)). After all, Section 924(c), by its terms, targets two types of *activity* with a firearm – use and carrying – that are required to have a close nexus to certain predicate offenses. It does not penalize mere intentions. A contrary interpretation of the statute, moreover, would be difficult if not impossible to reconcile with Section 924(d), which provides for forfeiture of firearms "used" in certain offenses *and* of firearms "intended to be used." See also pages 19-20 and note 9, *supra*.

3. Accessibility Of The Firearm To The Defendant, Even Immediate Accessibility, Is Not Sufficient To Establish Liability For "Use"

A third important limitation apparent from the text, structure, and history of Section 924(c) is that it does not make unlawful the presence of a firearm during a predicate offense merely because the weapon is accessible (even immediately accessible) to the defendant. So much is clear from the fact that Congress designed the statute not to reach all instances of carrying, but only those where the carrying is "in relation to" the predicate offense. See also pages 27-28, *supra*. There is simply no reason why Congress would have excluded *any* instances of carrying if immediate accessibility were enough to establish liability under the statute.

4. A Firearm Is Not Used In Relation To The Predicate Offense Merely Because Its Presence "Emboldens" The Defendant

It is equally clear that a defendant may not be convicted of using a firearm on the theory that the firearm "emboldens" the defendant to commit the predicate offense. That theory is too broad. In many instances, it would criminalize the mere possession of a firearm during the predicate offense, since such possession frequently can be alleged to "embolden" the defendant. Similarly, the emboldening theory subsumes almost every case where the firearm is accessible to the defendant. As just explained, however, accessibility alone cannot properly be the basis for liability. And, insofar as a defendant who is carrying a firearm can always be described as "emboldened," the theory also renders the carrying element superfluous.

The emboldening theory is erroneous not only because it does not describe a "use" of the firearm, but also because the kind of relationship to the offense it describes is not one made criminal by Section 924(c). In *Smith*, this Court observed that the phrase "in relation to" is "expansive"[22] and that, "at a minimum, [it] clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." 113 S. Ct. at 2059.

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[22] The Court cited *District of Columbia* v. *Greater Washington Board of Trade*, 113 S. Ct. 580 (1992), a case construing the phrase "relates to" in the preemption clause of ERISA. The analogy to the broadly worded ERISA preemption clause (see *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138-139 (1990)) cannot be carried too far, however, because the relationships targeted by that clause and by Section 924(c) are entirely different. Whereas ERISA's preemption clause refers to the relationship between state laws and ERISA plans, Section 924(c) targets the relationship between certain actions (*e.g.*, "carrying" a firearm) and predicate offenses. See, *e.g.*, *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995) (noting that state law may "relate to" an ERISA plan if the law "makes 'reference to' ERISA plans in any manner"). In any event, the Court made clear as recently as *Travelers* that not all laws that have an effect on ERISA plans can be said to "relate to" those plans. *Id.* at 1680.

The Court in *Smith* had no need, however, to "determine the precise contours" of this requirement because Smith's gun "was an integral part of the transaction," and "[w]ithout it, the deal would not have been possible." *Ibid.* (internal quotations omitted).

If the gun plays a pivotal role and has a tangible effect on the successful commission of the underlying offense, there is no doubt that the use is "in relation to" that offense. But if the "use" is less important to accomplishing the unlawful acts constituting the predicate offense, then the "use" must at least have a direct impact or effect on the predicate offense. It is not enough that the firearm embolden the defendant in the commission of the predicate offense.

Finally, the emboldening theory should be rejected as too indeterminate and as impossible to administer. J.A. 116 (Williams, J., dissenting). The theory invites juries and courts to speculate about whether a defendant was psychologically comforted by the existence of a gun, an inquiry that is inherently incapable of proof beyond a reasonable doubt, virtually incapable of consistent application, and impossible to review. Thus, the "emboldening" rationale promises either "a carte blanche for conviction" or a "continuous and vacillating review of jury verdicts." J.A. 116. That cannot and should not be the law.

B. The D.C. Circuit's "Proximity And Accessibility" Test Is Inconsistent With The Foregoing Limitations And Is Otherwise Erroneous

The majority below rejected the "open-ended test" previously used in the D.C. Circuit and "replace[d] it with a test [for 'use'] that looks to two factors only": (1) the proximity of the gun "to the drugs, drug paraphernalia, or drug proceeds" involved in the underlying offense; and (2) "the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located." J.A. 80, 101. One "uses" a gun within the meaning of Section 924(c)(1), the court held, by placing *or keeping* the gun in a location "from which one (or one's agent) can gain access to it *if and when needed to facilitate a drug crime*." J.A. 95 (emphasis added). The court held further that, when the predicate drug offense is a "continuing offense" such as possession with intent to distribute, the government need not show that the gun was in such a place at the time the defendant was ar-

rested; it is enough to show that the defendant "put or kept the gun" in such a place "at some point" in time during the defendant's possession of drugs. J.A. 95.

This test suffers from numerous flaws and should be rejected. As a threshold matter, it is difficult to see how the D.C. Circuit's "proximity" factor adds anything to the "accessibility" factor. As Judge Wald correctly noted in her dissent, "whenever the guns are located proximately to the drugs, they must also be potentially accessible to the defendant *from the place the drugs are being stored*." J.A. 103. Thus, the majority's test essentially collapses into a single factor: the firearm's proximity – not to the defendant, but to the "drugs, drug paraphernalia, or drug proceeds." J.A. 80, 101. Yet the statute plainly does not criminalize storing or keeping a firearm in the same place as money or ziplock bags or even drugs – it criminalizes contemporaneous *use* of the gun in relation to a predicate drug-trafficking offense. See also J.A. 102 ("Congress * * * created no statutory presumption that 'use' automatically would follow from the presence of any particular factors, and I can find no authority for courts to do so."). Indeed, the Solicitor General so concedes. Br. in Opp. 20 & n.4. The majority's test is impossible to reconcile with the plain language of the statute.

In addition to this shortcoming, the D.C. Circuit's test runs afoul of several of the necessary limits on "use" described above. The D.C. Circuit majority reasoned that a firearm kept in an accessible location is "used" because it can serve to protect the defendant, drugs, and drug proceeds. J.A. 95, 96. But that rationale is necessarily too broad, if in fact Section 924(c) does not reach mere possession, because it would apply "virtually whenever a gun is present near the scene of a drug crime." *McFadden*, 13 F.3d at 469 (Breyer, C.J., dissenting). Such a "possession for protection" theory sweeps all cases of mere possession within the ambit of "use" because all firearms – even those that are only possessed – have a potential utility. See *ibid.*; see also *United States* v. *Sullivan*, 919 F.2d 1403, 1432 & n.45 (10th Cir. 1990) (rejecting the "possession for protection" rationale), cert. denied, 113 S. Ct. 1013 (1993).

By focusing on the proximity of a firearm, and by relying on *inferences* of *potential* use rather than *evidence* of *actual* use, the

court affirmed petitioners' convictions based on the "theoretical possibility" of use rather than on use itself. See *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting). The "proximity" standard is inconsistent with the ordinary, active meaning of "use" (see *id.* at 466-467) and expands it to include mere potential use "when needed to facilitate a drug crime." J.A. 95.

Furthermore, the continuing nature of the predicate drug offense of possession with intent to distribute cannot justify inferring past use of a firearm from present possession. *United States* v. *Clemis*, 11 F.3d 597, 602 (6th Cir. 1993), cert. denied, 114 S. Ct. 1858 (1994). Here again, such a principle subsumes all cases of mere possession and permits conviction based on mere speculation of past use. The present case illustrates that problem. With regard to petitioner Bailey, for example, the prosecution presented no evidence whatever that he actually employed the firearm in his trunk at any time in the past. Accordingly, the court relied on generalizations about the prevalence of gun usage in the drug world (J.A. 98, 100) to conclude that past use could be inferred – *beyond a reasonable doubt* – from Bailey's possession of a firearm at the time of arrest. Permitting one person to be convicted on the basis of assumptions about other persons' conduct demonstrates the limitless reach of the majority opinion's interpretation of "use."

Nor can the majority's holding be reconciled with Congress's intent, clearly expressed in Section 924(d), to penalize "use" instead of mere "intended use." J.A. 112 (Williams, J., dissenting); see also pages 19-20, *supra*. As Judge Williams correctly noted, the majority's test departs from Congress's intent by essentially "dilut[ing] 'use' to mean simply possession with a floating intent to use." J.A. 108.

The D.C. Circuit's test also should be rejected because it could lead to absurd results. As Judge Wald explained,

> if the guns and drugs are found [all together] in a locked strongbox and the defendant is miles away, under the majority's test, the guns are arguably accessible to the defendant from the place where the drugs are stored and are being "used" to facilitate the possession of the drugs. To state the proposition is to reveal its illogic. Under the statute it is the

defendant who must use the gun, so it is the accessibility of the gun to him at the time of the drug offense charged that is relevant, not the accessibility of the gun to a phantom defendant who is positioned where the drugs are.

J.A. 103-104 (dissent). Thus, if the predicate offense is possession with intent to distribute and the defendant is "not in the immediate vicinity of the scene where the drugs and guns are found," the majority's test "can produce a ridiculous result." J.A. 104; see also J.A. 105 ("A defendant cannot have been 'using' a gun to protect drugs when he was nowhere near the gun."). This Court will avoid a construction of a statute that would lead to absurd results – even if the literal terms of the statute are far more helpful to that construction than are the terms here. See, *e.g.*, *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 510-511 (1989); *id.* at 527 (Scalia, J., concurring in the judgment).[23]

C. Courts Should Consider A Variety Of Relevant Factors In Determining Whether There Was Sufficient Evidence Of Use

To draw the line between "possession" and "use," and thus to determine which conduct will be punished by Section 924(c) and which by the Sentencing Guidelines instead (see page 17 and note 6, *supra*), some courts have examined various indicia of "use" and have upheld enhancements only when there were strong indications that the possession of the guns was for the protection of the drugs and thereby actually facilitated the possession with intent to distribute. The factors that should be reviewed (which have been developed by the courts of appeals, see *McFadden*, 13 F.3d at 468 (Breyer, C.J., dissenting)) are (1) the accessibility of the firearm

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[23] The D.C. Circuit's test should also be rejected because of the rule of lenity. Whatever else may be said of the majority's two-factor test, it is not an interpretation of Section 924(c) that would be apparent to the ordinary citizen. See *United States* v. *Aguilar*, 63 U.S.L.W. 4637, 4639 (U.S. June 21, 1995) ("We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.") (citations and internal quotations omitted).

to the defendant, (2) any proof of an actual drug transaction during which the firearm was used, (3) the type and number of firearms involved, (4) whether the firearm was loaded and ready for use, and (5) expert testimony concerning the government's case-specific theory of use.

1. *Accessibility Of Firearm To Defendant.* A factor courts have used to distinguish between use and possession is "the accessibility of the gun to the defendant." *United States* v. *Morris*, 977 F.2d 617, 621 (D.C. Cir. 1992); *Derr*, 990 F.2d at 1338; *United States* v. *McKinnell*, 888 F.2d 669, 675 (10th Cir. 1989). If a gun is sufficiently accessible to a defendant, that factor lends some support to an inference that the gun provided protection for the drug offense or that the defendant derived some service from the gun. By itself, this factor is not sufficient to establish use, as explained above. See *United States* v. *Conner*, 972 F.2d 1172, 1174 (10th Cir. 1992) ("[m]ere access to a firearm is insufficient to sustain a conviction" under Section 924(c)). Accessibility coupled with other circumstances can support a conviction, but *in*accessibility of a firearm strongly undermines a conviction.

2. *Proof Of A Drug Transaction.* A second indicium of firearm "use" is proof of an earlier drug transaction at which the firearm was actively employed or available to protect the drug operations. *Morris*, 977 F.2d at 622; *Bruce*, 939 F.2d at 1055; *United States* v. *Fermin*, 32 F.3d 674, 678 (2d Cir. 1994), cert. denied, 115 S. Ct. 1145 (1995); *United States* v. *Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988); *United States* v. *Theodoropoulos*, 866 F.2d 587, 597 (3d Cir. 1989). Evidence of such a transaction is particularly important when the predicate offense is possession with intent to distribute, because the transaction can bridge the gap between the active verb "use" and the "passive crime" of possession. *Bruce*, 939 F.2d at 1055. Evidence of a previous transaction that the firearm facilitated would be circumstantial evidence that the firearm was "used" during the later offense as well as that the defendant had incorporated it into a drug-trafficking operation. *United States* v. *Reyes*, 930 F.2d 310, 313, 314 n.5 (3d Cir. 1991).

3. *The Type, Condition, And Number Of Firearms Involved.* Many courts of appeals have ruled that the number of firearms involved in the predicate drug-trafficking offense is relevant in deter-

mining whether the firearms were "used"; the more guns present, the stronger the inference of use. Compare, *e.g.*, *Bruce*, 939 F.2d at 1056 (conviction reversed where only a single firearm was involved), and *Feliz-Cordero*, 859 F.2d at 254 (same), with *Morris*, 977 F.2d at 622-623 ("arsenal" of weapons supported Section 924(c) conviction), and *United States* v. *Williams*, 952 F.2d 418, 421 (D.C. Cir.) (same), cert. denied 113 S. Ct. 148 (1992). Although the "use" of a single weapon violates the statute, a purely circumstantial showing of "use" is weakened by the fact that no other weapons were present. The type and condition of a gun may also be relevant to whether it was used by a defendant and in what fashion. For example, a very large weapon such as a rifle would be difficult to "use" in a fashion that requires concealment on one's person. Similarly, if the weapon is not readily operable, its utility would be impaired. Thus, the specific features of the firearm in question are relevant to whether the gun was "used."

4. *Whether The Firearm Was Loaded And Ready To Fire.* Some courts of appeals have stated that an inference of "use" is strengthened when the firearm at issue is loaded. *Morris*, 977 F.2d at 622; *Derr*, 990 F.2d at 1338. Others, by contrast, have ruled that whether a gun is loaded is irrelevant to whether it is used because even an unloaded gun increases the risk of violence, and because "it is very difficult for a person to determine whether a gun was loaded or not when the gun is pointed at that person." *United States* v. *Gutierrez-Silva*, 983 F.2d 123, 124-125 (8th Cir. 1993); see also, *e.g.*, *United States* v. *Willis*, 6 F.3d 257, 265 (5th Cir. 1993). Certainly, this factor is relevant in at least some cases, depending on the government's theory of how the gun was "used" in a particular case.

5. *Expert Testimony.* Finally, some courts have looked to whether expert testimony bolstered the government's theory of "use" as advanced in a particular case. *Morris*, 977 F.2d at 622; *Derr*, 990 F.2d at 1338.[24] An expert's testimony concerning a

[24] Testimony by a government witness that guns are *often* or *typically* associated with drug operations cannot be considered particularly probative. *Derr*, 990 F.2d at 1339 (such evidence is only "marginally helpful to the prosecution"); see also *Bruce*, 939 F.2d at 1055 (expert testimony that guns and drugs "go hand in hand" insufficient to bolster inference of use). Rather, the testimony must help establish that "the gun *in this case* was used to protect the possession of *these* drugs." *Derr*, 990 F.2d at 1339 (second emphasis added).

specific firearm or the nature of drug-trafficking operations can sometimes serve to rule out certain "uses" for the weapon.

No single criterion identified above has dispositive weight; rather, courts must balance the criteria in determining whether a defendant "used" a firearm in connection with the predicate drug-trafficking offense. *Derr*, 990 F.2d at 1338. As next explained, that balancing process yields but one conclusion: the convictions of both petitioners should be reversed.

D. Once These Factors Are Considered, Both Petitioners' Convictions Should Be Reversed

The evidence presented at petitioners' trials was insufficient to prove, beyond a reasonable doubt, that either Bailey or Robinson "used" a firearm during the predicate offense of possession of cocaine with intent to distribute it. As an examination of the relevant factors makes clear, the evidence showed, at most, that each petitioner possessed, but did not use, a firearm.

1. Bailey was stopped for a traffic offense. When the police searched the car's interior, they found one round of .380-caliber ammunition on the console and a satchel containing 30 grams of cocaine in 27 plastic bags. J.A. 18, 80; 2/27/90 Tr. 74-75, 93, 106, 125. After arresting Bailey, the officers unlocked the car trunk (which was inaccessible from the passenger compartment) and found a vest containing approximately $2500 in cash. 2/27/90 Tr. 97-98, 117. Beneath "a whole lot of items," including "clothing and bags and other things," the police also found a bag containing a 9-mm. handgun that was "loaded with one clip" of ammunition containing six .380-caliber bullets. J.A. 6, 9; 2/27/90 Tr. 106. The police officers could not see the gun when they opened the trunk; indeed, the trunk was so full that it took roughly one minute to find the bag containing the gun. J.A. 9. Bailey also had approximately $700 on his person.

This evidence was insufficient to support a finding that Bailey "used" a firearm "in relation to" the crime of possession of co-

caine with intent to distribute it. There was no evidence that Bailey handled, brandished, displayed, referred to, or otherwise actively employed the firearm. With regard to accessibility, the gun was located in the locked trunk of the car Bailey was driving. In the court below the government conceded that "the firearm was relatively inaccessible." United States' Response to Appellant's Petition for Rehearing With Suggestion For Rehearing En Banc at 2. Indeed it was. No reasonable jury could find beyond a reasonable doubt that the gun in Bailey's car provided any protection to Bailey based on such attenuated availability.

In addition, there was no proof that Bailey had previously engaged in an actual drug transaction during which the firearm was used. The jury did find Bailey guilty of possession with *intent* to distribute. But there was insufficient evidence to find *actual distribution* – as the government implicitly conceded by not charging that crime and explicitly conceded in oral argument below (En Banc Tr. 57) – and it would require still a further unsupported inference to conclude beyond a reasonable doubt that Bailey, in a hypothetical transaction the government did not prove, used a firearm.[25]

The third factor (type and number of firearm) likewise favors Bailey. There was only one firearm involved. In addition, although the gun recovered from the trunk of Bailey's car was a 9-mm. pistol, according to the government's own expert it was loaded with much smaller .380 ammunition and thus incapable of firing more than one bullet unless the empty shell was manually removed and another bullet manually chambered.

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[25] The panel opinion illustrates the dangers of such speculation. The majority there conjectured, with no evidence beyond the contents of Bailey's car when he was stopped: "As [Bailey] walked from his car to the point of sale, like any drug dealer he was constantly in danger of being attacked by bandits or by a potential customer. Until the actual sale, of course, he possessed the narcotics. In effect, for a drug dealer on the streets, possession and distribution are inextricably linked * * * and the jury could reasonably conclude that during the tense moments leading up to the exchange of drugs and money, Bailey used the gun in the trunk to protect his inventory of drugs * * *." J.A. 27. This is rank speculation.

Fourth, the pistol found in Bailey's trunk, though loaded with a clip containing six bullets, was not yet ready to fire because a bullet had not been chambered.

Finally, the expert testimony presented at trial concerning the government's particular theory of use weighed significantly in Bailey's favor. According to the government's expert, the purpose of having a firearm within reach was for protection against "stick-up boys" who try to steal the drugs or money. J.A. 11-13. The expert agreed that, "[i]f you are trying to protect yourself" in this way, the weapon's "power and speed" are "what's most important." 2/27/90 Tr. 166-167. He also emphasized that a drug seller would need immediate access to his firearm because he would get no notice before a "stickup boy" confronted him. J.A. 13. Yet Bailey lacked immediate access to the gun, and the gun, loaded with a clip of .380-caliber bullets, lacked the "power and speed" that the expert said was so important. On this evidence, the jury could not have found "use" beyond a reasonable doubt.

2. The evidence presented at Robinson's trial was woefully deficient. The Derringer locked in a box in Robinson's closet was not accessible to her. The evidence at her trial showed that Parker, not Robinson, had the keys to the box. See 10/30/91 Tr. 110 (testimony of Sharine McKinney) (Parker "was the only one with the key, period"). Robinson periodically was able to gain access to the box, but there is no evidence that she had such access any time on July 16, 1991, or that such access had ever been employed to facilitate a drug transaction. Without access to the box on that date in the time before the police executed the search, Robinson would have lacked access to the Derringer.

Although there was evidence from which the jury inferred that a distribution offense occurred on July 15, that offense was not the predicate of the 924(c) charge. In any event the eyewitness testimony about that transaction showed that the Derringer played *no* role. As to the events of July 16, which *were* the predicate for the 924(c) charge, Robinson was charged with only a possessory offense, not actual distribution, and there was no evidence that the Derringer played any role even in *Parker's* distribution offense.

The remaining relevant factors likewise weigh strongly in Robinson's favor. As in Bailey's case, there was only one firearm

involved. In addition, it was unloaded (with no ammunition even found in the apartment) and thus necessarily unready to be fired. Finally, the government's expert gave testimony that supported the limited utility of the unloaded .22-caliber Derringer. According to the government's theory, this kind of weapon was a "second gun" – the type of weapon a drug dealer would "keep hidden on [her] person and use it until [she] get[s] [her] real gun." 10/30/91 Tr. 79; J.A. 49. But there was no evidence – none – that petitioner even knew of the gun's existence, much less ever had it hidden on her person. This factor, as well, also weighs strongly against any finding of use.

The evidence presented against Robinson could not support a finding, beyond a reasonable doubt, that she "used" the Derringer during and in relation to the July 16 offense. Robinson's conviction on the Section 924(c) count accordingly should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

(a)(1)

* * * * *

(a)(5)* Whoever knowingly violates subsection (s) of (t) or section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(5)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the com-

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* So in original. Two subsecs. (a)(5) were enacted.

mission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this section, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United

States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacturer or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3) or drug trafficking crime (as defined in subsection (c)(2) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

* * * * *

(i) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

* * * * *

(n) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.